

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

RICHMOND DIVISION

6 GOLDEN BETHUNE-HILL, et al. : Civil Action No.
7 vs. : 3:14CV852
8 VIRGINIA STATE BOARD OF : June 4, 2015
9 ELECTIONS, et al. :
10

11 COMPLETE TRANSCRIPT OF THE CONFERENCE CALL
12 BEFORE THE HONORABLE ROBERT E. PAYNE
13 UNITED STATES DISTRICT JUDGE

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P R O C E E D I N G S

JUDGE PAYNE: Hello. Do we have, to begin with, Judge Lee and Judge Keenan?

JUDGE LEE: Yes.

JUDGE KEENAN: Yes, Judge Payne.

7 JUDGE PAYNE: And then we have for the parties,
8 would you please identify yourself and who you represent,
9 and then each time that you speak, give your name, for we
10 have a court reporter here for these processes. The court
11 reporter does not need the name of Judge Lee and Judge
12 Keenan spoken every time, but for the lawyers who are
13 unfamiliar to us, we need that.

14 MR. HAMILTON: For the plaintiffs, Your Honor,
15 this is Kevin Hamilton from Perkins Coie, and with me on
16 the phone is Bruce Spiva and Aria Branch.

17 MR. TROY: Your Honor, this is Tony Troy for the
18 defendants State Board of Elections and Department of
19 Elections, and I believe I also have on the phone with me
20 Dan Glass and Godfrey Pinn. Dan, anybody else?

21 MR. GLASS: That's it.

22 MR. BRADEN: Your Honors, it's Mark Braden at
23 Baker and Hostetler. I have Jennifer Walrath with me, and
24 we are here for the defendant intervenors the Speaker of
25 the House and the House of Delegates.

1 JUDGE PAYNE: I'm sorry, your name is what?

2 MR. BRADEN: Mark Braden.

3 JUDGE PAYNE: And her name is what?

4 MR. BRADEN: Jennifer Walrath.

5 JUDGE PAYNE: Who just joined the meeting?

6 MR. PINN: Godfrey Pinn joined.

7 JUDGE PAYNE: All right, that's everybody. You
8 have the order that was issued on the -- docket 58 to set
9 the agenda. The process we'll follow is to ask you to
10 comment on each of the topics, and then any time one of
11 the judges wants to ask questions, they'll ask the
12 question that they want to ask, and if anybody thinks of
13 anything that needs to be dealt with, whether it's on the
14 agenda or not, it can be raised.

15 The best process, given the need for a record, is
16 if we speak, make sure we don't trample on each other's
17 lines when we talk.

18 So I will say that I have gotten the 60
19 privileged documents that were submitted in the notebook,
20 and I haven't had a chance to look at them yet. I will
21 look at them, and then we'll be talking among the judges
22 about that, and you'll hear from us just as promptly as we
23 can.

24 I gather you've seen the order extending the time
25 for the filing of motions *in limine*. All right, for the

1 plaintiffs, how many witnesses do you expect?

2 MR. HAMILTON: Your Honor, we anticipate calling
3 four witnesses; three members of the House of Delegates
4 plus Steve Ansolabehere. He's a professor from Harvard
5 University, and he'll be serving as our expert in this
6 case.

7 JUDGE PAYNE: Who are the House members you're
8 calling?

9 MR. HAMILTON: They'll be Delegate McClellan,
10 Delegate Dance, and Delegate Armstrong, although we may,
11 depending on how things progress, whether we call all
12 three of them or just two of them, we're not certain, but
13 those are the three.

14 JUDGE PAYNE: Delegates McClellan, Dance, and
15 Armstrong, and then you have an expert, and who is that?

16 MR. HAMILTON: His name is Dr. Stephen
17 Ansolabehere, and for the court reporter, it's spelled
18 A-n-s-o-l-a-b-e-h-e-r-e.

19 JUDGE PAYNE: How long do you expect the
20 testimony -- let's assume for the moment that you call all
21 of the listed delegates. How long is the testimony of
22 each expected to be, just approximately for planning
23 purposes?

24 MR. HAMILTON: Sure. Thank you, Your Honor.
25 Well, we anticipate the delegates to be relatively focused

1 and straightforward, so I would anticipate somewhere
2 between 30 and 60 minutes total including likely
3 cross-examination, but I would say 30 to 60 minutes for
4 planning purposes ought to be plenty.

5 JUDGE PAYNE: You mean all of them or each of
6 them 30 to 60 minutes?

7 MR. HAMILTON: Sorry, each of them.

8 JUDGE PAYNE: You're mindful of Rule 611, aren't
9 you, about duplicative testimony?

10 MR. HAMILTON: Absolutely, Your Honor. We have
11 no intention of duplicating testimony. They will not be
12 testifying as to the -- they're going to be testifying
13 generally to similar topics, but they'll be -- they each
14 have separate and distinct factual knowledge that we think
15 will be helpful to the Court.

16 To the extent that it's duplicative, we will try
17 and streamline that so we don't waste the Courts' time. I
18 remember the Court's admonition in the *Page* case to move
19 things along, and I haven't forgotten.

20 JUDGE PAYNE: The expert, how long do you expect
21 the expert will be?

22 MR. HAMILTON: Well, the parties are -- I know
23 this is a later topic on the subject, or on the agenda,
24 but the parties are discussing a stipulation to allow the
25 admission of virtually all the documents. We're going to

1 certainly avoid calling any foundational witnesses from
2 the state for the purpose simply of identifying or
3 authenticating or laying a foundation for documents.

4 Instead, the approach -- counsel, speak up if I
5 misrepresent here, but I think all counsel have agreed
6 that it would be far better to simply stipulate to the
7 authenticity and foundational requirements for all of the
8 documents and probably the admissibility for all the
9 documents, but we haven't gotten quite that far yet.

10 As to the -- and the only reason I bring this up
11 is as to the expert report, so long as we get the expert
12 report in evidence through a stipulation, then I think we
13 can streamline Dr. Ansolabehere's testimony because we
14 won't have to go through everything, and instead, what I
15 would intend to do is focus on his primary conclusions,
16 his methodology for reaching that and explaining it,
17 answering any questions any member of the Court might
18 have, and then moving on.

19 So I think we ought to be able to present -- for
20 my planning purposes, I've put down three to four hours
21 ought to be plenty, and I'm guessing we can do it more
22 efficiently than that.

23 JUDGE PAYNE: That, however, assumes that there's
24 an agreement that the report comes in; is that what you
25 are saying?

1 MR. HAMILTON: Yes, Your Honor.

2 JUDGE PAYNE: Because the report is hearsay and
3 doesn't ordinarily come in, and in the Page case,
4 everybody agreed to it so they came in.

5 MR. HAMILTON: That's right. And the parties
6 have agreed so far that we would follow the same approach
7 here.

8 JUDGE PAYNE: All right. All right, Mr. Troy,
9 for the state defendants, the Board of Elections clients
10 that you have, how many witnesses do you anticipate?

11 MR. TROY: Your Honor, we will be relying upon
12 the witnesses presented by the defendant intervenors and
13 so anticipate not putting on any witnesses. One witness
14 we have would be the head of the Department of Elections
15 only if there's a technical question, and I cannot
16 anticipate that. So the answer is, we will not be
17 presenting evidence other than relying upon the witnesses
18 of the defendant intervenors.

19 JUDGE PAYNE: Well, if you do that, will you be
20 questioning them yourself as well?

21 MR. TROY: I do not anticipate that, Your Honor,
22 no.

23 JUDGE PAYNE: All right, the intervenor
24 defendant, how many witnesses do you have, and at this
25 juncture, who do you think they'll be?

1 MR. BRADEN: Mark Braden. Your Honors, we
2 anticipate either four or five witnesses. The witnesses
3 would be Delegate Jones, who is the sponsor of the bill;
4 John Morgan, who is the technician who worked with him in
5 crafting the bill at his direction; and the three expert
6 witnesses, Dr. Hofeller, Dr. Hood, and Dr. Katz.

7 So we don't know whether it will be necessary to
8 call both Morgan and Jones or whether we would simply call
9 Delegate Jones. And to walk through the time --

10 JUDGE PAYNE: Excuse me just a minute. Is that
11 John Morgan, is he the expert who worked with him?

12 MR. BRADEN: Well, he's -- he will not be an
13 expert witness in this case. He is an expert -- he was a
14 consultant who worked with Delegate Jones in the crafting
15 of the plan. It's the same John Morgan who testified in
16 the other case, but in this case, he actually was involved
17 in the crafting of the plan at the direction of Delegate
18 Jones.

19 JUDGE PAYNE: All right, and what's Hofeller --
20 what are Hofeller, Hood, and Katz, basically what are they
21 going to address respectively?

22 MR. BRADEN: Dr. Hofeller is an expert on drawing
23 plans and compactness in comparison to other plans. So
24 he'll be talking about the construction of the plan and
25 their compactness in comparison to other plans either in

1 Virginia or other locations or in other litigation. So
2 talking about compactness, contiguous, sort of standard
3 issues like that.

4 Dr. Hood will be talking about the construction
5 of plans. He's been an expert witness in many cases in
6 this area. He will be talking about the political nature
7 of the plan, the underlying communities of interest,
8 traditional communities of interest, and other sort of
9 traditional criteria for the line-drawing process, and Dr.
10 Katz is a political science and statistician from Cal
11 Tech, and he will principally be testifying disputing the
12 expert witness testimony of the plaintiffs.

13 He has serious questions about their analysis on
14 both compactness, but most importantly on the statistical
15 analysis of VTD, vote tabulation districts, and the notion
16 of racial block voting. He has questions about the
17 methods used by the other professor, and he's a well-known
18 statistician from Cal Tech. That's what he's testifying
19 to.

20 JUDGE PAYNE: How long do you anticipate the
21 testimony of these witnesses to be?

22 MR. BRADEN: I would anticipate Delegate Jones'
23 testimony to be four to five hours at least. It's a
24 hundred districts. He doesn't have to talk about every
25 district, but to be candid with you, to describe the plan

1 and the underlying reasons will be quite lengthy
2 testimony, so I would expect four to five hours. I would
3 expect Mr. Morgan, if he testifies, to probably take
4 approximately an hour. The expert witnesses I would
5 expect to be two to three hours each.

6 JUDGE PAYNE: All right. Judge Keenan and Judge
7 Lee, do you have any questions on those topics at this
8 point?

9 JUDGE KEENAN: No.

10 JUDGE LEE: I don't have any questions. Thank
11 you.

12 JUDGE PAYNE: As to the number of exhibits and
13 the objections, are you all -- when are you going to know
14 whether you stipulate the admissibility of all exhibits
15 and/or whether there needs to be a ruling on any
16 objections? What is your timetable for doing that?

17 MR. HAMILTON: Your Honor, this is Kevin Hamilton
18 for the plaintiffs. The exhibit list is due, I believe,
19 on June 19th.

20 JUDGE PAYNE: Yes.

21 MR. HAMILTON: And so I, speaking for the
22 plaintiffs, I anticipate we'll be using all that time to
23 identify and compile our exhibits, and it will be the week
24 after June 19th that we'll be reviewing the intervenor's
25 exhibits, they'll be reviewing ours, and we'll come to a

1 stipulation.

2 We are already -- I've already forwarded to the
3 other parties in the case a partial list to start the
4 dialogue going, and Mr. Braden has expressed an interest
5 in, you know, providing similar early lists to plaintiff.
6 So the idea would be that we would be -- as we build our
7 witness list toward the filing on June 19th, we'd be
8 exchanging exhibit lists back and forth and hopefully
9 reaching as much agreement as we can.

10 So I would anticipate, in answer to the Court's
11 question, the week after June 19th that we'd be able to
12 identify to the Court whether we've successfully navigated
13 that issue or whether there are any areas remaining in
14 dispute.

15 And, Your Honor, before we move on, I did want to
16 say, I do anticipate a rebuttal case, responding to the
17 three different experts that defendants are calling.

18 JUDGE PAYNE: So what kind of rebuttal case do
19 you think you're going to have?

20 MR. HAMILTON: I anticipate that it would be
21 simply calling Dr. Ansolabehere to respond to the expert
22 testimony.

23 JUDGE PAYNE: For approximately how long do you
24 think?

25 MR. HAMILTON: You know, if I heard Mr. Braden

1 right, he's going to be presenting six to nine hours of
2 expert testimony between the three of them, so, you know,
3 maybe a couple hours to respond to that, at most.

4 I honestly think there's an awful lot of
5 duplicative testimony between the three, so we should be
6 able to respond to it fairly, fairly promptly. By that
7 time, I'm quite certain that the Court will be ready to
8 have us moving it along, and I'll do the best I can, but
9 it's difficult, not having heard what they're going to say
10 for nine hours or eight hours or six to nine hours, I
11 don't know in advance how long it will take to rebut that.

12 JUDGE PAYNE: All right. So you're going to
13 check back with us after the 19th about whether you've
14 agreed on things; is that correct?

15 MR. HAMILTON: That's correct, Your Honor, and I
16 guess I would propose maybe perhaps that -- the 19th is a
17 Friday -- perhaps by the 26th, I guess I could propose
18 that we could file something with the Court to let the
19 Court know the status of those discussions.

20 JUDGE PAYNE: Well, I'd like to hear before then
21 so that we can build in time to rule on any objections if
22 we need to. I guess that can all be done on the 26th; is
23 that what you are thinking?

24 MR. HAMILTON: I was thinking on the -- just the
25 proposal would be that on the 26th, the parties would

1 submit hopefully a joint document that simply says, you
2 know, the parties have met and conferred and stipulate to
3 the admission, to the authenticity, and admissibility of
4 all of the documents under respective exhibit lists with
5 the exception of, if there is any, Exhibits 12, 17, 39,
6 and 84.

7 JUDGE PAYNE: I was just looking at my book here,
8 and I can't find -- I probably wrote it down somewhere
9 else. Is there a final pretrial conference set here for
10 our case, and if so, when?

11 MR. HAMILTON: Your Honor, again, it's Kevin
12 Hamilton for the plaintiff. I am looking at the Court's
13 order -- the pretrial scheduling order of March 3rd.
14 Paragraph 12c has a deadline of June 25th, "Any objections
15 to exhibits shall be filed with the clerk no later than
16 June 25th." That's a Thursday.

17 So I guess the Court has already set a deadline
18 for indicating whether there's objections with the Court,
19 and I guess we propose we adhere to that deadline.

20 JUDGE PAYNE: I don't have that order in front of
21 me. Is there a pretrial conference date in that order?

22 MR. HAMILTON: I don't believe so.

23 MR. BRADEN: This is Mark Braden. We don't see a
24 date for that, no.

25 JUDGE PAYNE: And is there a date in that order

1 for the hearing of motions *in limine*?

2 MR. HAMILTON: I don't believe so, Your Honor.

3 This is Mr. Hamilton. I don't believe so, Your Honor.

4 JUDGE PAYNE: We probably need to set that date,
5 so we'll see how we proceed. All right, it might be
6 helpful to discuss item five, the theories of the case for
7 each side, to kind of help get us oriented and thinking in
8 the right direction, and we may end up, each of us, of the
9 judges may have questions as you go along, so anybody,
10 just feel free to interject at such time as you want to.
11 So start with the plaintiff.

12 MR. HAMILTON: All right. Thank you. Your
13 Honor, from the plaintiff's perspective, this is a really
14 straightforward case, and our case theory is fairly
15 simple. The equal protection clause of the 14th Amendment
16 forbids race-based redistricting absent a compelling state
17 interest, and even then, even if the state does identify a
18 compelling state interest, it can use race only when it's
19 narrowly tailored to meet the state interest. That's the
20 law.

21 Our theory of the case is that in 2011, the
22 Virginia General Assembly used race as the predominate
23 factor in drawing the 12 house districts that are at issue
24 in this case; B, had no compelling state interest for
25 doing so; and C, in any event, failed to narrowly tailor

1 those districts to meet whatever state interest defendants
2 or intervenors might identify.

3 The case, we think, is substantially easier and
4 clearer than the recent Page decision which involved the
5 Third Congressional District in Virginia last year before
6 this Court, and that's for two reasons. First, to the
7 extent that there was any doubt about the controlling
8 legal standards for such a claim, they have been
9 emphatically laid to rest by this Court's decision in the
10 Page case last year and by the Supreme Court's decision in
11 the recently decided case of *Alabama Legislative Black*
12 *Caucus v. Alabama.*

13 There, the Supreme Court made it clear that a
14 legislature may not utilize, and I quote, mechanical
15 racial targets, close quote, in a misguided effort to
16 comply with the Voting Rights Act non-retrogression
17 standard. That aligns precisely with this Court's ruling
18 in Page to the same effect.

19 So that's the first reason, the law is
20 substantially --

21 JUDGE PAYNE: Is it your view that there was some
22 mechanical formula or figure used? Is that what you are
23 going to seek to prove?

24 MR. HAMILTON: Exactly, Your Honor, and that's
25 the second reason why this is an easier and clearer case

1 than Page. The record before the Court, the delegates,
2 Delegate McClellan, Delegate Dance, and Delegate Armstrong
3 will testify that they were aware and they were told of a
4 55 percent black voting age population threshold or floor
5 that was used in drawing all of the 12 majority/minority
6 districts, and you'll hear during the course of the trial
7 that black voting age population figure repeated over and
8 over again in testimony and in the documents, 55 percent
9 BVAP, B-V-A-P, is how, as you know, Your Honor, is how
10 it's referred to.

11 In addition, the chief map drawer, Delegate
12 Jones, who the intervenors intend to call, himself
13 repeatedly and emphatically articulated that 55 percent
14 BVAP floor in the floor debates before the House of
15 Delegates and in email communications that have been
16 produced during the course of discovery.

17 There are transcripts of several floor debates
18 and a committee hearing that we'll be presenting and
19 putting into evidence in which the delegate, Delegate
20 Jones, is responding to questions on the floor of the
21 House about how it was drawn. The evidence will show that
22 when requests were made to fix a precinct split or a
23 voting tabulation district split, it was rejected. Even
24 though the black voting age population resulting from
25 fixing that split would have been 54.8 percent, it was

1 rejected, and the reason given was because it didn't meet
2 the 55 percent target, and that's a quote from the
3 document, and we'll be presenting that in evidence.

4 Two-tenths of a percent was too much, and that
5 demonstrates how the black voting population threshold or
6 floor was used to trump all other considerations.

7 So we think the case is pretty straightforward.
8 The legal standards have been reiterated and clarified,
9 and the record is even clearer and stronger than the
10 record that was before the Court last year in Page.

11 JUDGE PAYNE: All right. Judge Lee or Judge
12 Keenan, do you all have any questions for the plaintiff on
13 that topic?

14 JUDGE LEE: I don't have any questions.

15 JUDGE KEENAN: I only had one question with
16 regard to the absence of a compelling state interest and
17 in any event no narrow tailoring. Does the plaintiff
18 intend to present evidence in its case in chief, or is
19 that going to be saved for rebuttal?

20 MR. HAMILTON: The expert witness -- I mean the
21 answer is, Your Honor, I believe we'll be presenting
22 evidence on that with respect to -- in our case in chief,
23 and this is how it works, or this is how it will be
24 presented, I think.

25 In these cases, often the explanation is -- I

1 think the explanation of the state here for using the
2 55 percent black voting age population is we needed to
3 prevent retrogression, meaning we needed to prevent any
4 retrogression in the ability of the minority community to
5 elect a candidate of their choice, to have opportunity to
6 elect the candidate of their choice, and typically, the
7 way that a state would do that in order to comply with the
8 Voting Rights Act is to conduct a racial block voting
9 analysis in order to determine what level of BVAP, of
10 black voting age population, do we need to have in this
11 district to ensure that the minority population has the
12 opportunity to elect its candidate of choice.

13 And the problem here is that the State did not do
14 a racial block voting analysis, and, of course, that's
15 obvious because they used a single number for 12 districts
16 across the board, and even the defendants -- I'm sorry,
17 the intervenor's own expert will say that he'd be shocked,
18 he'd be surprised if the level of white crossover voting
19 would be the same in all 12 districts such that black BVAP
20 were -- exactly the same for all 12 would have been
21 required.

22 So that's part of our case in chief of
23 identifying -- sort of blowing up -- you can't -- the
24 State cannot point to compliance with Section 5 of the
25 Voting Rights Act as their defense using race.

1 And the other -- the only other explanation
2 they'll come forward with is it was all about politics,
3 and that is not a defense to using race in violation of
4 the 14th Amendment. That is not a legitimate -- that may
5 be a legitimate purpose in the course of redistricting,
6 but it's not a compelling state interest, and the problem
7 here is that the map drawers used race, not politics.

8 It's a 55 percent black voting age population
9 floor that was used. They didn't use, you know, some
10 measure of democratic or republican political performance.
11 If they did, that would have been permissible. That's
12 legal to do, but the 55 percent rule is not 55 percent
13 democratic performance or republican performance. It's 55
14 percent black voting age population.

15 It's sorting people by the color of their skin.
16 It's forbidden by the 14th Amendment absent a compelling
17 state interest, and part of our case in chief through Dr.
18 Dr. Ansolabehere will be to explain that there was no
19 racially polarized voting analysis done here, and this was
20 not done in an effort to comply with the Voting Rights
21 Act.

22 JUDGE PAYNE: Does that answer your question,
23 Judge Keenan?

24 JUDGE KEENAN: Yes, thank you.

25 JUDGE PAYNE: Do you propose to present, Mr.

1 Hamilton, as a part of your case, an alternative map to
2 show what it would have -- or should have looked like if
3 the proper procedures had been followed?

4 MR. HAMILTON: Your Honor, it's Mr. Hamilton for
5 the plaintiffs. We have not -- we have not prepared our
6 own map for use -- or maps from all 12 legislative
7 districts. We do intend to offer maps that were before
8 the House of Delegates at the time.

9 JUDGE PAYNE: The things that they had available
10 to them to consider.

11 MR. HAMILTON: Correct.

12 JUDGE PAYNE: But you're not offering your own
13 map to show what properly should have been done.

14 MR. HAMILTON: Correct, Your Honor, we're not.

15 JUDGE PAYNE: As I understand what you said in
16 discussing your case, you do not intend to take on each
17 district individually, because what you are doing is
18 striking at the one basic point, and that is the
19 application of the 55 percent BVAP figure as a floor, and
20 that permeated and controlled all of the drawing -- the
21 drawing of all the districts that are at issue, and you're
22 not really going to be attacking them district by
23 district; is that correct?

24 MR. HAMILTON: Not really, Your Honor. We will
25 be attacking them individually through the use of Dr.

1 Ansolabehere who goes through each individual one. I
2 think the Court in *Alabama* made it clear, and perhaps
3 that's the genesis of the Court's question, made it clear
4 that you do -- it is a district-specific analysis that's
5 required, and that is exactly what Dr. Ansolabehere will
6 be doing.

7 You are absolutely correct, Your Honor, that the
8 same 55 percent rule is applied to all 12, and that, of
9 course, is a fact that's relevant to each of the 12
10 districts, but in addition, Dr. Ansolabehere is looking at
11 compactness of each of the 12 districts, and he's doing an
12 analysis of the VTD which is the -- or precincts that were
13 moved into and out of each one of the 12 districts in
14 order to analyze both race and politics to answer the
15 question, what's the more powerful explanation for which
16 precincts were included and which precincts were
17 excluded -- is it race or is it politics -- and the
18 conclusion that he comes to is that, by far, race is a far
19 more powerful explanation or predictor for explaining --
20 in other words, you can have similarly situated
21 politically performing districts, and if one is more
22 heavily black than the other, then the black district is
23 more likely included rather than excluded.

24 JUDGE PAYNE: That's really a rebuttal point,
25 though. Once they raise the issue of political reasons,

1 if they do that, then you put on your testimony about
2 that's not correct; isn't that how you go about it?

3 MR. HAMILTON: I think it's an inherent part of
4 our case in chief, Your Honor, that we have to demonstrate
5 that race was the predominant factor in drawing these
6 districts, and one of the pieces of evidence that goes to
7 that point is how those precincts were selected. I mean,
8 they were selected because of race. I mean, I think it's
9 necessarily race, not politics --

10 JUDGE PAYNE: But as to each of the 12 districts,
11 you are saying that the 55 percent is the controlling
12 factor, and the other factors that you are going to
13 discuss through the doctor, whose name has slipped my mind
14 now --

15 MR. HAMILTON: Ansolabehere.

16 JUDGE PAYNE: -- is really for the purpose of
17 explaining why race is the predominant question, issue.

18 MR. HAMILTON: That's right. That's exactly
19 right.

20 JUDGE PAYNE: Okay. How about the defendants?

21 MR. TROY: Your Honor, Tony Troy. We believe
22 that the plan is defensible. I was going to emphasize,
23 but the discussion just verified that each and every
24 district has to be looked at and analyzed, and the
25 defendant intervenors are, I know, going to be presenting

1 evidence on each of those instances.

2 JUDGE PAYNE: All right. Mr. Braden.

3 MR. BRADEN: Your Honor, this case, from our
4 point of view, is very much simply a replay of *Wilkins v.*
5 *West* from ten years ago. The same attacks were made on
6 the Virginia redistricting plan following the last census.

7 This plan is, in many ways, like that plan except
8 the plan that was adopted following the last census is a
9 plan that is -- the House delegate is more compact. It
10 doesn't have the contiguosity issues that were present
11 in the other plan, and it had much broader political
12 support.

13 The *Shaw* claim that's being made by the
14 plaintiffs in this case requires that they show that race
15 predominates over all other traditional race-neutral
16 principles for redistricting, that the plan itself is
17 unexplainable other than based upon race.

18 We're going to show the Court the various
19 districts that had been rejected in prior *Shaw*-style
20 litigation, and you'll see that they all involve plans
21 which have districts that, frankly, don't look like
22 districts. They don't bear any resemblance to any notion
23 of geography.

24 Our intention is to go through district by
25 district and explain why the districts look the way they

1 are. They are more compact, and, in fact, they are
2 compact as defined under the Virginia constitution. The
3 Virginia constitution, unlike most states, has a very
4 specific provision about districts being compact and
5 contiguous.

6 The plan adopted by the legislature here clearly
7 meets those requirements as articulated in *Wilkins v.*
8 *West*. It's a more compact plan, and the contiguous issues
9 that were raised in that litigation, frankly, were solved
10 in this plan.

11 So this is a plan under Virginia law that is
12 compact. That's the basic principle we're talking about
13 here, that in all the *Shaw* cases is the beginning of the
14 process of an indication of this plan is not explainable
15 under traditional redistricting criteria.

16 So it's our intention simply to go district by
17 district and explain why the lines are drawn the way they
18 are. The long and short of it is, yeah, is race
19 considered? Absolutely race is considered, but race does
20 not get you to strict scrutiny unless you have ignored the
21 other traditional redistricting criteria and race is
22 predominant.

23 If race alone, if the consideration of race alone
24 resulted in strict scrutiny, then every single legislative
25 plan in the United States, with the exception of Vermont

1 and Maine, would be subject to strict scrutiny.

2 If you look at *Cromartie*, you look at the whole
3 line of *Shaw* cases which control here, the first step is
4 the plaintiffs have to show that race predominated over
5 all other, all other criteria. It cannot prove that. We
6 will walk through -- and that's the reason why we have the
7 architect of the plan.

8 The process of drawing a legislative plan is
9 complex, complex both legally and politically. So, you
10 know, it's going to be -- we're talking about Delegate
11 Jones being on the stand for a lengthy period of time so
12 you can walk through the process of the line-drawing
13 process, why the districts look the way they do.

14 I hear that they're going to call Delegate
15 Armstrong, the minority leader, and one of the reasons why
16 the plan was drawn the way it was is now Delegate Jones is
17 no longer a member of the legislature. He lost his seat
18 because of the way the lines were drawn. He was a
19 minority leader.

20 So what we're talking about here is a process of
21 walking through for the Court why this plan is faithful to
22 a series of criteria which were adopted by the
23 legislature, very specific criteria adopted by the
24 legislature and very traditional. So we just simply are
25 going to walk through the process and explain to the Court

1 the plans that are being attacked here look nothing like
2 the plans which had been rejected by the Supreme Court in
3 prior litigation. We don't look anything like those.

4 This is a plan where race was most certainly
5 considered, but that doesn't get you strict scrutiny. So
6 if you've got the strict scrutiny, we certainly believe we
7 could survive that, too, because it must be a compelling
8 state interest to comply with one-person-one-vote but also
9 to comply with the Voting Rights Act, and in this case,
10 we're not simply talking about compliance for purposes of
11 preclearance under Section 5, but we're also talking about
12 compliance under Section 2.

13 *Thornburg v. Gingles* requires the creation of
14 districts where you have racial block voting present which
15 the history of Virginia certainly is an indication of
16 that. We have a substantial legislative record where
17 we've gone around the state and gotten testimony. There's
18 plenty of history of Section 2 litigation in the state of
19 Virginia where they found racial block voting.

20 So there's -- the *Thornburg v. Gingles* series of
21 cases most certainly means that we have to look at
22 discrete minority communities. If we can draw a
23 reasonable district around them that's reasonably compact
24 and we have racial block voting and polarized voting, we
25 have to create those under Section 2.

1 So we're not only talking here about a compelling
2 interest under section -- to get the plan pre-cleared.
3 We're also talking about the needs of Section 2 to get the
4 plan so we're not in a piece of litigation where the same
5 plaintiffs lawyers we have right now are suing us because
6 we didn't create these districts.

7 JUDGE PAYNE: Are you going to offer evidence
8 that all that was taken into account in constructing the
9 plan?

10 MR. BRADEN: Absolutely. No question about that
11 whatsoever. We had a series of hearings around the state.
12 The 55 percent number doesn't come from thin air. It
13 comes from testimony before the House of Delegates.
14 That's to find numbers needed to be able to create
15 functioning minority districts.

16 You know, this litigation -- we should all be
17 very candid. This litigation is not about representation
18 of the minority community. The problem the plaintiffs
19 have with the plan is the fact that after the plan was
20 drawn, it had the political effect that people intended it
21 to have. The vast majority of the incumbents got
22 reelected except for a few democratic white members lost.

23 That's the predominant underlying purpose of the
24 plan. We shouldn't pretend anything else. This Court
25 should be well-aware of that. That's what's going on

1 here. This plan was drawn for political purposes. The
2 effect of the plan in the actual following election was
3 just what was predicted was going to happen.

4 So the notion that race predominated simply flies
5 in the face of reality, both the way the plan looks, the
6 way the plan was constructed, the evidence underlying it,
7 and the effect of the plan. The effect of the plan was
8 some white democratic members of the legislature lost.
9 Has nothing to do with race. It had a lot do with
10 politics.

11 JUDGE PAYNE: Are you saying that you're going to
12 offer evidence that the predominate purpose was to knock
13 out some democrats? Is that what you are saying?

14 MR. BRADEN: Absolutely. That was one of the
15 predominate -- the magic word here, a predominate purpose,
16 the predominate purpose of the plan was to maintain the
17 status quo. That is, in fact -- the recognized purpose of
18 the plan was to maintain the status quo. Because of
19 population changes, certain districts had to be moved
20 around the state.

21 When you move districts around, there is losers.
22 Republicans were in charge. The losers were white
23 democratic members, absolutely. No one should -- we don't
24 need any political scientist from Harvard to tell us the
25 reality of what happened here. The notion that somehow or

1 another there's some standard use of racial polarized
2 voting, I see no history -- the State of Virginia has
3 submitted a number of plans to the Department of Justice
4 for preclearance. I can find no record of the State of
5 Virginia hiring a political science professor to do a
6 racial block voting before doing this submission.

7 The record, I believe even in the *Page* case, the
8 *Page* Court recognized that a racial block voting analysis
9 by political scientists was not necessarily better than
10 the elected members from those districts.

11 The 55 percent number comes from members elected
12 from those districts and people who live in those
13 districts as to what was necessary for the minority
14 community to elect their candidate of choice. It's not a
15 number picked from thin air.

16 JUDGE PAYNE: All right. Now, Judge Lee, Judge
17 Keenan, do either one of you have any questions at this
18 point?

19 JUDGE LEE: I'm ready to hear the evidence in
20 support of oral argument. I think we've already heard
21 some closing arguments now. Thank you.

22 JUDGE PAYNE: We have, haven't we? I have this
23 question: What is the significance in the law of saying
24 that the political result, the objective was to knock
25 democrats out of seats? Does that present a

1 quintessential political gerrymander case that we're
2 dealing with here? If so, what does that do to the legal
3 construct of the case if we accept that view? I'm sure --

4 MR. HAMILTON: Your Honor, this is Mr. Hamilton
5 for the plaintiff. It's no different than the argument
6 that was advanced in the *Page* case and that's always
7 advanced in the *Shaw* line of cases that it's politics, not
8 race, and that's exactly why courts look to the evidence,
9 and what the Court, the Supreme Court has held in these
10 cases is if you're going to use race, and your explanation
11 for using race is that you need to do it in order to
12 prevent retrogression under the Voting Rights Act, then
13 you have to have a strong basis in evidence for that
14 belief, and the strong basis of evidence typically is a
15 racial block voting analysis, and the absence of doing
16 that makes it awfully difficult for the State to say that
17 we had to do this in order to prevent retrogression in a
18 minority -- to allow -- to prevent retrogression from a
19 minority community's ability or opportunity to elect
20 candidates of their choice.

21 This isn't something that's been made up. It's
22 in the Department of Justice regulations that were in
23 evidence last year before this Court and will be in
24 evidence again this year in this case.

25 JUDGE PAYNE: But, Mr. Hamilton, no Court has

1 ever held that a block voting analysis case is the only
2 way to prove what they're proving; is that right?

3 MR. HAMILTON: Fair enough, but it's certainly
4 not the case that it's the opposite. It's not the case
5 that a court has ever said, oh, well, we've had some black
6 delegates say I need a higher number of -- again using
7 race -- black voters in my district in order to get
8 reelected. The constitutional analysis is no different
9 than if you flip that around and you have white delegates
10 saying --

11 JUDGE PAYNE: I understand. I just was asking
12 the question if there's a case that I'm unaware of about
13 that, but the question -- I don't recall in *Page* that
14 there was any evidence or that it was the same as what Mr.
15 Braden just said.

16 In *Page*, it was a combination of the political
17 desire plus the traditional voting -- traditional
18 redistricting criteria that the defendants rode as their
19 defense.

20 Here, we seem to be talking about achievement of
21 a particular political result as the predominate purpose,
22 and to my knowledge, the Supreme Court has never upheld
23 political gerrymandering absent some purpose such as to
24 maintain a balance, fair balance or to achieve fairness.

25 That's why I was asking Mr. Braden the question,

1 whether or not that's what he was doing. So neither one
2 of you see this construct -- this is raising a different
3 issue than is raised in *Page* which is fundamentally what
4 was the predominate purpose, and that's as far as you are
5 going, Mr. Hamilton, and that's as far as you are going;
6 is that correct, Mr. Braden and Mr. Hamilton?

7 MR. BRADEN: It's our belief that you do not get
8 to strict scrutiny until the plaintiffs prove that the
9 predominant purpose was race.

10 JUDGE PAYNE: Okay.

11 MR. BRADEN: Until such time, the Court does not
12 need to consider the issue of strict scrutiny. It's the
13 wrong construct at that stage.

14 JUDGE PAYNE: All right, Mr. Hamilton, you're of
15 the same view, that you are trying this in the same mold
16 as *Page*, and your theory is race was the predominant
17 purpose, and there's no part of your complaint that's any
18 different than that; is that right?

19 MR. HAMILTON: That's correct, Your Honor, and
20 it's very clear from the application of the uniform
21 55 percent --

22 JUDGE PAYNE: You don't need to make the argument
23 again. I think, as Judge Lee said, we heard it. How
24 about these motions *in limine*, have you gotten any notion
25 yet as to whether you're going to have motions *in limine*,

1 how many they're going to be, et cetera? Mr. Hamilton,
2 how about for the plaintiff?

3 MR. HAMILTON: Your Honor, we have not finalized
4 a decision on that yet. I think it's fair to say we are
5 disinclined to be filing any motions *in limine* at this
6 point, but we haven't made a final decision on that.

7 JUDGE PAYNE: How about you, Mr. Braden, do you
8 see anything yet?

9 MR. BRADEN: No, we do not.

10 JUDGE PAYNE: All right. If you all agree on the
11 exhibits and there aren't any motions *in limine*, we may
12 not need a final pretrial conference or -- we certainly
13 don't need any arguments on motions *in limine*, but maybe
14 we ought to look to setting a date to do that, and we can
15 do that later in just a few minutes.

16 I've done some quick math, and that's not my
17 strongest suit, but I hear, assuming we start at 10:00 and
18 quit at 1:00 and have a break in the middle, and 2:00 to
19 5:00 or thereabouts and have a break in the middle, we're
20 looking at six hours or so, five, six hours of trial time
21 a day.

22 That would mean, under your time estimates, three
23 full days at the low end. Is that how you people see your
24 case, this case shaping up? Mr. Hamilton?

25 MR. HAMILTON: Your Honor, Mr. Hamilton for the

1 plaintiff. I think that the three days that the Court has
2 scheduled ought to be fine. I guess the one -- there's a
3 question that's hanging here, and that is, does the Court
4 anticipate either opening statements or closing arguments?

5 JUDGE PAYNE: I don't know about the rest of the
6 judges, but I don't think any closing arguments are
7 necessary after a three-day trial when you're going to
8 have post-trial briefs keyed to the record on an expedited
9 basis.

10 MR. HAMILTON: Again, Mr. Hamilton for the
11 plaintiff. Assuming that there's no closing arguments and
12 that opening statements, which, at least from the
13 plaintiff's perspective, we think would be useful, you
14 know, a 15-minute orientation to the record from each of
15 the parties I think would be useful at the start of the
16 case, but assuming that, I think the three days ought to
17 be plenty of time to try this case.

18 JUDGE PAYNE: I think in order to achieve that on
19 the schedule we're talking about, which is starting at
20 10:00 and going to 1:00 -- Judge Lee has a docket up there
21 that he's got to take care of, and he's got to do some
22 early work and has to do some evening work in order to get
23 ready for the next morning, et cetera, et cetera, so he's
24 proposed starting at 10:00, and if we go to 1:00 with,
25 say, a 15-, 20-minute break in the middle, that's two and

1 a half hours, and then you do the same thing, take an hour
2 for lunch because it takes awhile to get something to eat
3 up there in Alexandria, another two and a half hours,
4 you're looking at five hours maybe if we go over a little
5 bit or something happens, and it's an appropriate thing to
6 go over, you're looking at maybe five hours and a half or
7 six.

8 You all are going to have to do some real
9 tailoring through your questioning in order to get it in
10 in three days. I think it is set for three days on the
11 docket; is it not?

12 MR. BRADEN: I believe that to be the case, that
13 it's set for three days. From our perspective, Your
14 Honor, I think you correctly perceived three days will be
15 extremely difficult. I hate to be the person suggesting
16 lengthening it, but I have serious doubts as to whether we
17 can do it in three days.

18 The Supreme Court did require us to look at each
19 district, and from our perspective, looking at each
20 district frankly involves looking at the districts that
21 are surrounding it, too, to really understand why they
22 were drawn. It's a long narrative for this plan, and it
23 has a lot of --

24 JUDGE PAYNE: Well, it is, but I also note that
25 you have two experts talking about the same topic, and

1 that's drawing plans, and I don't understand -- ordinarily
2 in this district it's one expert per topic.

3 So why is there any overlap there with Mr.
4 Hofeller and Mr. Hood? Maybe I just didn't understand
5 exactly what the scope of their testimony was, but we
6 don't need to hear from two experts on the same topic, I
7 don't think.

8 MR. BRADEN: Your Honor, Mark Braden. I believe
9 they are actually talking about slightly different topics.
10 We can most certainly -- there is some overlap in their
11 reports, and we can most certainly limit the experts to
12 only talk about the parts of their report that are
13 separate in analysis, Your Honor, but I do think that
14 Jones's testimony is likely to -- given the fact that he's
15 going to have to go through in some very substantial
16 detail the key here is we are -- he is going to have to
17 talk about 12 districts and then the districts that
18 surround them, and we have an expert report on the other
19 side saying, well, these statistics tell us X.

20 Unfortunately, from our viewpoint, to make our
21 case, Delegate Jones is going to say, no, really the
22 reason why we did this particular VTD is because the
23 incumbent member from the other district lives there. The
24 problem we have with the plaintiff's expert report is the
25 plaintiff's expert, in fact, knows nothing other than the

1 numbers about the state.

2 JUDGE PAYNE: You don't need -- I understand
3 that. The point is -- Judge Lee and Judge Keenan can
4 weigh in about whether they think we need any duplicate
5 testimony by experts on the same topics. I know both of
6 them are pretty -- pay attention to the record pretty well
7 when they're trying cases. Do you share my apprehension
8 about overdoing the experts on the same topics?

9 JUDGE LEE: I'm not sure -- I'm sure that we will
10 all be very hypersensitive to duplicative testimony, but I
11 think the way it's been described, some of it may be
12 necessary from the standpoint of particular districts and
13 the expert's opinion, but I think we can monitor that, and
14 the three of us will be able to be -- and the lawyers will
15 be able to focus that aspect of it.

16 I do have a concern that's been raised, and that
17 is whether or not three days is really enough to do all
18 the things you are talking about given the number of
19 experts, and one of the questions I had is whether you
20 would limit the examination of the witnesses by each side.
21 That's probably not possible in a case like this. That is
22 my observation.

23 JUDGE PAYNE: You think it's not possible? Is
24 that what you said?

25 JUDGE LEE: I don't think it is possible to tell

1 in advance how much time each plaintiff gets or defendant
2 gets on cross or direct, because you don't know what they
3 need to prove. I don't know.

4 JUDGE PAYNE: Let's assume it's necessary to go
5 over. You have a full docket, Judge Lee, on the 10th of
6 July. That would mean going to the next week, or you'd
7 have to change your docket.

8 JUDGE LEE: Well, I didn't want to do this on the
9 phone with you. I'm open to doing what you need to do,
10 and that is if that's carry over to the 13th, if I know
11 now, I can make some arrangements for that.

12 JUDGE PAYNE: Well, that's what I'm doing, saying
13 I don't know -- I think maybe if we really think that it's
14 going to take an extra day, we ought to reserve that day
15 now so we are all on each other's dance card, and I don't
16 know what anybody's schedule is at this juncture, but,
17 Judge Keenan, if we had an extra day, would your
18 preference be Friday, the 10th, or Monday, the 13th?

19 JUDGE KEENAN: It would be Friday, the 10th, but
20 I'm available either day, so I would leave it to you,
21 Judge Payne and Judge Lee, regarding your trial schedules.

22 JUDGE LEE: If it's not terribly inconvenient,
23 the Friday docket that we have, I have to move. I've been
24 out for several weeks, so if I could have my Friday
25 docket -- I could work Friday afternoon and work from 2:00

1 until 6:00 if you need that on Friday, if you needed to do
2 that, and then Monday, but I want to have from 8:00 to
3 1:00 to do my civil and criminal docket if possible.

4 JUDGE KEENAN: I think we're asking too much of
5 you, Judge Lee. It seems to me that you don't need to
6 pile on top of that on Friday afternoon.

7 JUDGE PAYNE: I agree with that, and I think in
8 addition to that, what may happen is we may not even be
9 finished. I think it's better to let you all regroup and
10 sort yourselves out so you can definitely be finished.
11 I'll have to make some changes for July 13th, but I can do
12 it. Can you do it, Judge Keenan?

13 JUDGE KEENAN: Absolutely.

14 JUDGE PAYNE: Then that will be the flow-over
15 day, but I think if you are careful, Mr. Braden, in
16 avoiding duplication of testimony with your experts -- the
17 way you sounded when you were describing them, there seems
18 to be some fair overlap, but each of them is addressing
19 some component of the traditional redistricting plan or
20 criteria, so maybe you could confine them to discrete
21 areas and not have them overlap and talk about the same
22 things that the other one has talked about.

23 MR. BRADEN: Absolutely, Your Honor. We'll take
24 your direction on that and most certainly attempt to
25 tailor their direct testimony in that way.

1 MR. TROY: Your Honor, this is Tony Troy. Would
2 it -- if we adjourned at 6:00 on the three days rather
3 than 5:00, would that, do you think, accommodate everyone?

4 JUDGE PAYNE: Well, I think this is -- to tell
5 you the truth, before *Page*, I would have said yes. This
6 is pretty dense stuff, frankly, and I think it's a little
7 hard to take it all in and deal with it if you sit too
8 long during the day, and I think Judge Lee has dockets at
9 nine o'clock every morning, don't you, Judge Lee?

10 JUDGE LEE: I do, and a docket on Friday to
11 prepare for, so I have other things to do.

12 JUDGE PAYNE: So between 5:00 and 6:00, he's not
13 going out and having a drink, in other words.

14 JUDGE LEE: Right.

15 MR. TROY: That was Mark Braden who made that
16 suggestion, not Tony Troy.

17 JUDGE PAYNE: Oh, okay.

18 JUDGE LEE: Thank you for that.

19 JUDGE PAYNE: Opening statements, you started
20 that. How long -- you will have pretrial briefs, won't
21 you?

22 MR. HAMILTON: We will, Your Honor.

23 JUDGE PAYNE: So how long an opening statement do
24 you think you need?

25 MR. HAMILTON: Ten to 15 minutes, Your Honor, to

1 orient the Court.

2 JUDGE PAYNE: Mr. Braden?

3 MR. TROY: Your Honor, we probably would take
4 five minutes to articulate our position, no more.

5 MR. BRADEN: And, Your Honor, it's our view that
6 ten to 15 would be sufficient given the briefing.

7 JUDGE LEE: I'll remind you that brevity is the
8 hallmark of great advocacy.

9 JUDGE PAYNE: Do we need a separate order on
10 that?

11 MR. HAMILTON: If I can make one other suggestion
12 with respect to the length of the trial, and I brought
13 this up with Mr. Braden before and I do not think we have
14 agreement on it, but in other trials where we're pressed
15 for time, I've seen courts utilize a chess clock where you
16 take the available time that is available to both the
17 parties, split it evenly, and charge the party who is on
18 their feet talking with the time. So I would be charged
19 for direct examination of my own witnesses, Mr. Braden or
20 whoever would be charged for the cross-examination of my
21 witnesses, and then the reverse would be true during his
22 case, and that would be a fair way to allocate whatever
23 limited time we've got and force the parties to
24 concentrate on presenting their case efficiently.

25 JUDGE PAYNE: I have used that before, but I

1 think Judge Lee said he thought this may be a difficult
2 case in which to operate in that fashion. Did I mishear
3 that?

4 JUDGE LEE: That's what I said, but I guess my
5 question would be to plaintiff's counsel, if you knew
6 starting on Tuesday that you had to be done by Wednesday
7 at lunch, could you do that?

8 MR. HAMILTON: Well, I certainly could. The
9 problem is the length of the cross, but, you know, a day
10 and a half is easy from my perspective as long as we have
11 pretrial briefs which we do, we have stipulation on the
12 evidence and we're not chewing up a lot of trial time
13 arguing about admissibility of materials which I don't
14 think I'll have that problem, but putting on our direct
15 evidence, I think, especially in light of this discussion,
16 we will do the best we can to be succinct, organized, and
17 as direct as we can, but, yeah, a day and a half.

18 That's the reason why I said, I think, three days
19 ought to be plenty, and I don't think that the
20 cross-examinations, honestly, should -- in other words,
21 the direct of the plaintiff and cross-examination of the
22 plaintiff ought to be able to happen in a day and a half,
23 and I think the reverse is true as well as during the
24 defense and intervenor's case.

25 JUDGE LEE: The defense is going to be charged

1 with their time on cross, because their cross is really
2 going to be substantive evidence anyway as well as
3 whatever witnesses they call, so I think if we make that a
4 target with the idea that unless there's some really good
5 reason beyond that by lunchtime on the 8th, plaintiff
6 ought to be done.

7 MR. HAMILTON: And there is an additional reason
8 here that I feel compelled to say, and that is my
9 co-counsel, Mr. Spiva, who is on the phone here, is in
10 trial, has a trial starting in North Carolina on that
11 Monday, the 13th.

12 JUDGE PAYNE: Mr. Braden, that would mean, if
13 it's three days, you get a day and a half.

14 MR. BRADEN: Yes, Your Honor, and, again, I hate
15 to be the one putting the fly into the soup or whatever
16 here, but I do believe our case is likely to take longer
17 than their case. Delegate Jones is going to be a very
18 lengthy testimony before we get to direct.

19 We will have to walk through each district, and
20 each district will entail a discussion of most of its
21 boundaries, because they are alleging -- the only way we
22 can respond to it is to explain to the Court exactly why
23 this piece went that way and that piece went that way, and
24 that's an involved process, because it's not -- it is --
25 this is legislation, and we're going to have to go down

1 and look at which pieces go in which places to explain to
2 the Court that this was a political process, not this sort
3 of simple, you know, black people go here, white people go
4 there. That was not the process. It was much more
5 complex. That is a more lengthy discussion than simply an
6 expert witness telling you what the numbers are.

7 So I think a day and a half, although we will do
8 whatever the Court directs, I think it is likely going to
9 be difficult for us to get our witnesses on in that time
10 frame.

11 JUDGE PAYNE: Maybe the judges ought to talk
12 about this after having heard from both of you and decide
13 which way to go. I gather from what you are saying you do
14 not -- and from what Mr. Hamilton said, that you do not
15 favor a clock approach.

16 MR. BRADEN: I do not, because I think our case
17 involves a longer period of time.

18 JUDGE LEE: Counsel, do you think it is going to
19 take you two and a half days?

20 MR. BRADEN: I think it will take us two days. I
21 think it could be done in two days, but I don't think it
22 can be done in a day and a half.

23 JUDGE LEE: I had that impression. Sounds like
24 you need two, two and a half. That's fine. We can have a
25 conversation offline, Judge Payne.

1 JUDGE PAYNE: All right. We'll let you know
2 right away. Are you going to be, either one of you, using
3 deposition testimony? Mr. Hamilton?

4 MR. HAMILTON: Your Honor, we don't anticipate
5 putting in deposition testimony directly except we may be
6 using it, of course, for impeachment in cross-examination,
7 but otherwise, if we do, we would propose submitting it in
8 written form. We have no intention of reading deposition
9 testimony to the Court.

10 JUDGE PAYNE: I understand, but also that raises
11 the question about whether there are objections to it and
12 how to accomplish that. So you need to fish or cut bait
13 fairly quickly about whether you're going to use
14 deposition testimony. If you are, we need to make sure we
15 have the objections to it straightened out and a way to
16 rule on what comes in.

17 How about you, Mr. Braden, are you contemplating
18 the use of any -- or Mr. Troy, the use of any deposition
19 testimony in your case other than --

20 MR. BRADEN: This is Braden, and the answer is
21 no.

22 MR. TROY: This is Tony Troy, and the answer is
23 no.

24 JUDGE PAYNE: So that doesn't look like it's an
25 issue. Of course, in impeachment, you're welcome to use

1 whatever you need.

2 Intended use of the court's evidence presentation
3 system, do either one of you want to do that? If you do,
4 we need to make sure you know how to use it.

5 Judge Lee, I don't know how you do it, but we
6 have them come a day beforehand and make sure they know
7 how to use it working with our IT people. Is that what
8 you do up there?

9 JUDGE LEE: Yes. The person they need to call is
10 Lance Bachman. He is our courtroom IT coordinator. He
11 will set up training and schedule your training. If you
12 have IT professionals who will be presenting your
13 electronic evidence, have that person come up, and make
14 sure you have duplicate systems. That is to say if you
15 have one laptop and it goes down, we will keep going, so
16 you need to have a duplicate of whatever you present.

17 If you all have any PowerPoints or slides or
18 things like that, make sure you have three color copies
19 for each of the judges in addition to what you present
20 visually.

21 JUDGE PAYNE: On the topic of exhibits --

22 JUDGE LEE: I'm sorry. They should have -- wait
23 a minute. You should have at least six copies of whatever
24 it is you present for the law clerk and the judge.

25 JUDGE PAYNE: All right. And on the exhibits, we

1 need exhibit notebooks. Do you have any idea at this
2 juncture what the volume of exhibits are, Mr. Hamilton --
3 I'm hoping you can consolidate them and make them a
4 unified set for the most part. What are you looking at
5 right now?

6 MR. HAMILTON: We anticipate -- I apologize for
7 the large range, but somewhere in the 100 to 150 exhibits,
8 but one of the exhibits, for example, is the Virginia
9 submission to the Department of Justice for preclearance
10 of these plans, and that's a really lengthy document.

11 So what we're intending to do is actually break
12 it up into multiple smaller exhibits so that it's easier
13 to use in trial, and it's easier for the Court to
14 understand which part of this massive document is relevant
15 to the issues before the Court.

16 JUDGE LEE: Let me jump in one second. The same
17 is true for exhibits. You have to have a set for the
18 judges and the law clerks to look at.

19 JUDGE PAYNE: And, of course, the witness. The
20 other thing that you need to think about and work with,
21 perhaps you work with Judge Lee's courtroom deputy, but
22 getting that volume of documents into the courtroom and
23 available to the judges is something you need to focus on
24 so that it can be -- we won't spend a lot of time passing
25 documents around.

1 Typically, you'll need to make sure there's some
2 bookcases up there, small bookcases for the judges on the
3 bench so that we can handle the number of documents that
4 we have to handle. If you have a large volume of
5 exhibits, and right now it's a little premature to ask
6 that, to ask you to give any answers to that with any
7 accuracy, but as you get closer to trial, you're going to
8 have to focus on how to get that accomplished, because
9 you're going to have three sets of exhibits up on the
10 bench, then three law clerks who will have desks, and then
11 you've got one for your witness and whatever you've got
12 for the other side and yourself.

13 That's a lot of documentation, so you need to
14 work with Judge Lee's -- is that how you do it, Judge Lee,
15 is have your courtroom --

16 JUDGE LEE: Yes, you can contact chambers. My
17 law clerk's name is Avier Gaitan. Avier will be able to
18 coordinate with you, because my courtroom deputy will be
19 able get you in the courtroom and you all can set things
20 up, and hopefully we can -- if you're using electronic
21 evidence, that will make things go faster from the
22 standpoint of some of this.

23 I'm sure some of the judges will prefer to see
24 the documents themselves, but if you can put some of this
25 electronically, it may go faster, too.

1 JUDGE PAYNE: It's one thing to read it in the
2 courtroom. It's another thing to mark it up and take it
3 back home with you, because we're not going to have all of
4 what the courtroom has.

5 Let's go ahead and try to get a date for a
6 hearing on motions *in limine*. What's the order say about
7 when those things are due now? What did we do on that
8 order?

9 MR. HAMILTON: File by June 9th, Your Honor.
10 This is Mr. Hamilton.

11 JUDGE PAYNE: All right. So why don't we --
12 maybe the judges can talk. The way we did it in *Page* is
13 one of the judges -- in that case I happened to be the
14 designee -- dealt with the motion *in limine* unless we
15 thought it was something that all three of us, after
16 having had a chance to read it, needed to sit on. Would
17 you all like to follow the same procedure?

18 JUDGE KEENAN: As to the judges, Judge Payne?

19 JUDGE PAYNE: Yes.

20 JUDGE KEENAN: That's fine.

21 JUDGE LEE: Judge Payne, I'm fine with that, too.

22 JUDGE PAYNE: I'll put it on my calendar, and
23 then I'll be responsible for communicating with the other
24 judges once you file these things if there is anything,
25 and you're going to have them filed by the 19th, so I

1 would say the 24th or the -- I would say maybe the 24th in
2 the afternoon at 2:30. Any reason you can't do that?

3 MR. HAMILTON: No objection to that date, Your
4 Honor.

5 MR. BRADEN: No objection.

6 MR. TROY: Your Honor, Tony Troy. We're not
7 filing any, so obviously no objection.

8 JUDGE PAYNE: That will be the date for the
9 motion *in limine* if we need it. And then your trial
10 starts the day after the -- two days after the holiday, so
11 final pretrial conference if we need one, I don't know --
12 it turned out in *Page* we really didn't need anything.

13 I'm not sure exactly what we're going to be doing
14 in the final pretrial conference, but I suppose it could
15 be objections to exhibits is about all I know.

16 JUDGE LEE: I think we can go forward without a
17 final pretrial. Objections to exhibits, I think we can
18 probably handle them in due course if we need to without
19 having to elongate it. I don't need another pretrial
20 after this one.

21 JUDGE PAYNE: All right, Judge Keenan?

22 JUDGE KEENAN: That's fine.

23 JUDGE PAYNE: Okay. If there are any objections,
24 we'll resolve them at trial or tell you before the trial,
25 because they'll all be in writing anyway. So we won't

1 need any other conference. Is there anything else that
2 anybody needs to take up?

3 MR. BRADEN: Your Honor, I'm assuming that the
4 trial, the pretrial brief will be limited to 30 pages?

5 JUDGE LEE: 30 pages, that's right, and that's
6 plenty.

7 JUDGE PAYNE: I don't know that we need any more
8 than that.

9 MR. BRADEN: I'm not suggesting that. I just
10 wanted to confirm it. So thank you, Your Honors.

11 JUDGE PAYNE: Anything else that Judge Keenan or
12 Judge Lee need to take up?

13 JUDGE KEENAN: No, thank you.

14 JUDGE LEE: No, thank you.

15 JUDGE PAYNE: We need to -- the judges need to
16 focus on the trial date, or are we satisfied that we will
17 carry to the 10th if we need or whatever that day, the
18 13th?

19 JUDGE LEE: I'll make arrangements to carry to
20 the 13th.

21 JUDGE PAYNE: All right. Is that all right with
22 you, Judge Keenan?

23 JUDGE KEENAN: Yes, it is.

24 JUDGE PAYNE: Why don't we plan this, folks, and
25 then we won't have to have any more calls. If there's a

1 need for a carryover day, it will be the 13th. Counsel,
2 do you have anything? Nobody.

3 MR. HAMILTON: No, Your Honor.

4 JUDGE PAYNE: Thank you very much. We look
5 forward to working with you.

JUDGE KEENAN: Thank you, Judge Payne.

7 JUDGE LEE: Thank you all, counsel.

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9 (End of proceedings.)

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transcript from the record of proceedings in the
above-entitled matter.

P. E. Peterson, RPR

Date